No. 83-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF REVIEW OF WILL COUNTY; and LYMAN C. TIEMAN, TED GRABAVOY, and HERMAN L. OLIVO, individually and as members of the Board of Review of Will County; and WILL COUNTY, ILLINOIS,

Petitioners,

v.

BEVERLY BANK, Trustee under Trust No. 8-3130; and DEMETRIOS DELLAPORTAS, PAUL COMET and MICHAEL HALIKIAS, Beneficiaries, and ALL MOTOR PARTS, INC., a corporation, on their own behalf and on behalf of all individuals similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS THIRD DISTRICT

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QUESTIONS PRESENTED

1. Is action by local government which denies a right to equal treatment for purposes of taxation that is secured by state law a denial of equal protection of the laws as secured by the Fourteenth Amendment, thereby giving rise to a right of action for damages and other relief under 42 U.S.C. § 1983.

2. Is the failure of local taxing officials to assess commercial and industrial real property and all personal property for taxation at the same rate as all other real property as required by state assessment laws a denial of equal protection of the laws as secured by the Fourteenth Amendment, thereby giving rise to a right of action for damages and other relief under 42 U.S.C. § 1983.

3. Where state law permits classification of property for purposes of taxation, but local government fails to pass the necessary legislation to implement such classification, does action by local government in increasing the assessed valuation of commercial and industrial real property and all personal property while leaving the assessed valuation of all other real property unchanged violate the equal protection clause of the Fourteenth Amendment thereby giving rise to a right of action for damages and other relief under 42 U.S.C. § 1983.

4. When only property rights are involved, does the availability of a state administrative remedy, with subsequent judicial review, which fully satisfies procedural due process bar a challenge to governmental action where the challenge is based solely upon a claim that the action gives rise to an arbitrary and capricious classification in violation of the equal protection clause of the Fourteenth Amendment.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

In The

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS THIRD DISTRICT

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, Third District, entered in favor of respondents on August 24, 1983.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Third District, dated August 24, 1983, is reported at 117 Ill. App.3d 658, 453 N.E.2d 96 (1983), and appears in the Appendix at p. 1a. The December 6, 1983 order of the Illinois Supreme Court denying Petitioners' Petition for Leave to Appeal is not reported and appears in the Appendix at p. 13a. The May 3, 1982 order of the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois, has not been reported and appears in the Appendix at p. 14a.

JURISDICTION

The judgment of the Appellate Court of Illinois, Third District, was entered on August 24, 1983. On December 6, 1983, the Illinois Supreme Court denied Petition for Leave to Appeal and this Petition for a Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 (Supp. IV 1980)

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case was before the court below on an appeal by the respondents from an order of the circuit court granting the petitioners' motion for judgment on the pleadings.

The respondents are owners of commercial and industrial real property and owners of personal property located within Will County, Illinois, and maintain this action on behalf of themselves and all owners of commercial and industrial real property and personal property located within Will County. Damages and other relief are sought under 42 U.S.C. § 1983 against the Will County Board of Review and its members and against the Coun-

ty of Will arising out of an increase in the property assessments of all commercial and industrial real property and personal property by the petitioners.

After local assessors had assessed all property, the Illinois Department of Local Government Affairs assigned a tentative multiplier of 1.13 to Will County for the tax year 1978. This multiplier was the factor necessary to equalize the Will County assessments at the statutorily required level of 33⅓ percent of fair cash value. Respondents asserted that after the petitioners received the notice of this tentative multiplier, the petitioners unlawfully increased the assessed valuation of commercial and industrial real property and personal property for the purpose of and with the intent of eliminating the imposition of the state multiplier on residential, farm, and other real property.

Pursuant to this end, the Board of Review applied a uniform formula or percentage, across the board, to all commercial and industrial real property to increase the assessment. At this same time, the Board of Review increased the assessments of all taxable personal property in Will County by 10 percent. Shortly thereafter, the Board sent notices to all owners of commercial and industrial property and all owners of personal property that their assessment had been increased.

Under the Illinois Constitution and Illinois statute, counties can classify property for purposes of taxation, but such classification is void unless it is established by ordinance of the county board. ILL. REV. STAT. ch. 120, § 501(a) (1979). Will County did not pass such a classification ordinance.

Illinois law also provides that after assessment by local assessors, the Board of Review may increase the assess-

ment of real or personal property, but only after giving the affected taxpayers notice and an opportunity to be heard. ILL. REV. STAT. ch. 120, § 589(5) (1979).

In increasing these assessments, the Board is said to have acted arbitrarily and capriciously, in violation of state law and the due process and equal protection clauses of the Fourteenth Amendment, and acted with the purpose and intent of imposing a higher tax burden on the owners of commercial and industrial real property and the owners of personal property so that other taxpayers would not bear this burden. The due process violation arises out of the failure of the Board of Review to provide a hearing prior to increasing the assessments, as required by Illinois statute.

In their answer to the third amended complaint, the petitioners have admitted that they applied a formula to increase the assessments of commercial and industrial real property and personal property and that that formula was not applied to other real property. Thereafter, the petitioners filed a motion for judgment on the pleadings and the circuit court entered judgment in favor of the petitioners and against the respondents. The Appellate Court of Illinois, Third District, affirmed the circuit court on the due process claims, but reversed the circuit court on the claim that the increase in assessments deprived the respondents of equal protection of the laws as secured by the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW AND THE DISTRICT COURT OPINIONS UPON WHICH IT RELIES CONFLICT WITH THE DECISIONS OF THIS COURT AS TO THE PROPER INTERPRETATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In its opinion below, the appellate court erroneously relied upon language contained in an opinion of this Court, language which is internally inconsistent with the holding of this Court that violations of state law do not contravene the Constitution. The appellate court also erroneously focused solely upon the existence of a purpose and intent to discriminate, without looking to the question of the irrationality of the classifications which were the subject of the differential treatment.

Applying different rates of taxation to property *within the same class*, violates the federal Constitution. *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350 (1918). Personal property can be taxed at a different rate than real property without running afoul of the equal protection clause of the Fourteenth Amendment. *Klein v. Board of Tax Supervisors of Jefferson County*, 282 U.S. 19, 24 (1930).

The petitioners did not apply different assessment rates to property within the same class. All commercial and industrial real property was treated alike. All personal property was treated alike. There can be no doubt that treating commercial and industrial real property and personal property different from all other property for purposes of taxation passes federal Constitutional muster. The claim that the assessment was illegal under state law because

Will County did not pass the necessary enabling ordinance to permit classification adds nothing to the Fourteenth Amendment analysis.

Forty-five years ago, a railroad had argued to this Court that a Tennessee procedure which resulted in the property of public service corporations being systematically assessed at full value while other property was assessed at far less than full value violated the state's uniformity requirement and violated the equal protection clause. *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362 (1939). The Court noted that even if the evidence had established differential treatment for purposes of taxation, a constitutional claim was not made out.

> It must be emphasized that the company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer. All these cases are inapposite. None deny the power to a state to apply different yardsticks to different classes of property. Equally irrelevant are those cases in which this Court, because of the nature of the litigation, was construing the uniformity clause of a state constitution, and was not applying the Fourteenth Amendment. This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure. (310 U.S. at 367-68) (citations omitted).

Later, in *Snowden v. Hughes*, 321 U.S. 1, 11 (1944), the Court cited *Browning* with approval and stated:

> [S]tate action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.

Earlier decisions have noted that violations of state constitutional provisions requiring uniformity of taxation do not, standing alone, give rise to Fourteenth Amendment claims. *Puget Sound Power & Light Co. v. Kane County*, 264 U.S. 22, 28 (1924); *Coulter v. Louisville & N. Rd. Co.*, 196 U.S. 599, 608-609 (1904). *Accord Dreyer v. Illinois*, 187 U.S. 72 (1872).

In *Snowden*, the Court referred to a "familiar example" of an equal protection claim as being one in which local officials fail to tax property uniformly *as required by local assessment laws*. (321 U.S. at 9). The court below relied upon this statement which is dicta and which also conflicts, internally, with the statement of this Court that violations of local law are not actionable under the federal Constitution.

The court below also focused on language of this Court in *Snowden* that an equal protection claim is stated if there exists "an element of intentional or purposeful discrimination." (321 U.S. at 8). While relevant, this mental state alone is not dispositive absent an analysis of the rationality underlying the classes created by this discrimination. The function of the equal protection clause is to measure the validity of classifications. *Parham v. Hughes*, 441 U.S. 347, 358 (1979). The Fourteenth Amendment does not prohibit purposeful or intentional discrimination, but only such discrimination if it results in the creation of irrational classifications.

The only other authorities relied upon by the court below are two district court opinions, both of which fail

to recognize the principle of *Snowden* that the violation of state law, standing alone, is not actionable under the Fourteenth Amendment.

II.

WHERE A STATE STATUTORY SCHEME AFFORDS A REMEDY, THE PURPOSE OF WHICH IS TO PROVIDE AN AVENUE FOR CHALLENGING A DENIAL OF PROPERTY AS BEING ARBITRARY AND CAPRICIOUS, A SEPARATE AND INDEPENDENT ACTION TO CHALLENGE ARBITRARY AND CAPRICIOUS ACTION ON AN EQUAL PROTECTION BASIS SHOULD BE UNAVAILABLE.

The purpose of the due process clause is not simply to afford an aggrieved party notice and an opportunity to challenge what he believes to be a denial of property—an opportunity to jump through procedural hoops. The clause should not be construed to exalt form over substance. The substantive aspect of the due process clause is what is of primary concern since the obvious concern is the correctness of a governmental decision, not simply the right to challenge it.

This substantive aspect of the due process clause focuses on whether action by the state has a rational basis and is not "so inadequate that the judiciary will characterize it as arbitrary." *Jeffries v. Turkey Run Consol. Sch. Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974).

In this hearing, the aggrieved party will be litigating whether the denial of property was arbitrary or capricious. When only property rights are involved, the existence of the opportunity to be heard provides adequate remedies for any equal protection claim which is also based upon a challenge to the caprice of the government since there is an overlap of issues.

A different rule would obtain in the face of a constitutional challenge arising, for example, out of a First, Fourth or Thirteenth Amendment claim. Then there would not exist the overlap and the similarity of issues.

Like the substantive due process issue, an equal protection analysis also focuses on irrationality, arbitrariness and capriciousness. *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981). While due process and equal protection are not coextensive concepts, there does exist some overlap.

> [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. (*Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

Accord Rogin v. Bensalem Township, 616 F.2d 680, 689 (3rd Cir. 1980) *cert. denied*, 450 U.S. 1029.

Since there exists this similarity and overlapping of issues, at least where only property rights are involved, and since the litigant will be focusing on the irrationality of the action, there exists no need to provide a completely duplicate avenue of relief.

The appellate court below held that even though a hearing at one stage was not provided, the opportunities for further review provide all of the process that is due. This Court has held that the Illinois review scheme affords a "plain, speedy and efficient" opportunity to obtain tax relief. *Rosewell v. LaSalle Nat'l. Bank*, 450 U.S. 503 (1981). During such hearing, one can raise equal protection claims and consider such issues as the propriety of

a particular classification and the lack of uniformity. *Rosewell v. LaSalle Nat'l. Bank*, 450 U.S. 503, 515 (1981); *Stephens v. State Prop. Tax. App. Bd.*, 42 Ill.App.3d 550, 356 N.E.2d 355 (1976).

Petitioners are not raising exhaustion of remedy concepts for it is not being argued that state relief must be sought before invoking a right to relief under 42 U.S.C. § 1983. The existence of the opportunity to raise identical issues in a proceeding to which a party must resort to remedy due process claims bars the action. *See Dusanek v. Hannon*, 6[illegible] F.2d 538, 543 (7th Cir. 1982).

III.

THIS CASE INVOLVES IMPORTANT QUESTIONS NEEDING RESOLUTION AND EXTENDING BEYOND THE IMMEDIATE ISSUES.

Even though this case is brought before the Court in a tax setting, the issues extend far beyond. The question of the extent to which violations of local law give rise to equal protection claims is not limited to tax matters. Similarly, the question of the interrelationship of the due process clause and equal protection clause is not limited to the tax setting. Both issues can and do arise in other settings which are becoming increasingly popular as the subject of obtaining Section 1983 relief. The principles of this case would extend to zoning, licensing and employment decisions and other areas where the state has provided a mechanism to obtain relief from arbitrary governmental action.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Illinois, Third District.

Respectfully submitted,

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APPENDIX

No. 82-313

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D. 1983

BEVERLY BANK, Trustee under Trust No. 8-3130; and DEMETRIOS DELLAPORTAS, PAUL COMET and MICHAEL HALIKIAS, Beneficiaries, and ALL MOTOR PARTS, INC., a corporation, on their own behalf and on behalf of all individuals similarly situated,

Plaintiffs-Appellants,

vs.

BOARD OF REVIEW OF WILL COUNTY; and LYMAN C. TIEMAN, TED GRABAVOY, and HERMAN L. OLIVO, individually and as members of the Board of Review of Will County; and WILL COUNTY, ILLINOIS,

Defendants-Appellees.

Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois.
The Honorable **Thomas W. Vinson**, *Presiding Judge*.

Mr. JUSTICE BARRY delivered the opinion of the court.

Plaintiff taxpayers appeal from an order granting defendants' motion for judgment on the pleadings and dismissing the complaint in this action for damages arising out of an increase in real property assessments of all industrial and commercial property by the Will County Board of Review.

According to the allegations of the third amended complaint filed about April 4, 1979, in this cause, which com-

plaint is the basis for the defendants' motion for judgment on the pleadings, the Department of Local Government Affairs of the State of Illinois assigned a tentative multiplier of 1.13 to Will County for the tax year 1978. This multiplier was determined by the Department to be the factor necessary to equalize the Will County assessments at the statutorily required level of 33⅓ per cent of fair cash value.

The pertinent language of the complaint is as follows:

"(18) Commencing approximately in the spring of 1979, and subsequent to receipt of notice from the LGA of a 1978 tentative multiplier of 1.13, the defendant members of the Board of Review conspired and engaged in a concert of action to unlawfully increase the assessed valuation of industrial and commercial real estate and personal property, *for the purpose and with the intent* of eliminating the imposition of a state multiplier of 13% on residential, farm and other real estate owned by preferred taxpayers.

"(19) As part of and in furtherance of said conspiracy and concert of action, defendants engaged in the following course of conduct:

a) In August 1979, without any classification of real property ordinance of the County Board of Will County and in violation of Section 20a of the Revenue Act, Ill. Rev. Stat. (1979) Ch. 120, §501a, the Board of Review applied a uniform formula and/or percentage factor, across the board, to all industrial and commercial real property in Will County, for the purpose of increasing the assessment on said real property and thereby attempting to eliminate the effect of the 1.13 multiplier tentatively imposed by the LGA as to all other types of property owners.

b) In August 1979, the Board of Review increased assessments ten percent (10%), across the board, on all taxable personal property in Will County, for the purpose of alleviating the

effect of the 1.13 multiplier tentatively imposed by the LGA as to all other types of property owners.

c) On or about September 24, 1979, the members of the Board of Review caused to be issued to each owner of commercial and/or industrial real property and each owner of taxable personal property in Will County a 'Notice of the Revised Assessment for 1978.' Said notices informed each such taxpayer of the increase in assessments imposed by the Board of Review.

"(20) The defendant Board of Review and its members arbitrarily and discriminatorily, and with neither legal classifications, guidelines, nor approval by the County Board of Will County, increased the 1978 assessments only as to commercial and industrial real estate and personal property owned by plaintiffs and members of the plaintiff class, contrary to state law and in violation of the constitutional rights of plaintiffs and the plaintiff class to due process and equal protection under the laws as provided in the Fourteenth Amendment to the United States Constitution:

(a) Without imposing increased assessments on any other taxable real estate in Will County;

(b) *With the purpose and intent* of imposing an unlawful financial burden on plaintiffs and members of the plaintiff class, so that other taxpayers would experience no tax increase * * * ;

(c) Without rational basis nor lawful reason for the selection of plaintiffs or plaintiff class members as those who would bear said financial burden;

(d) Without any rational relationship between said increased assessment and the actual assessed value of the property of plaintiffs and the plaintiff class;

(e) Without providing any meaningful hearing before the Board of Review.

"(21) On or about December 1979, tax bills were sent to all taxpayers in Will County, including the taxpayers whose taxes were calculated upon the assessments which were unlawfully revised. Payments of said tax bills were to be made by January 31, 1980 and payments have been received by the Treasurer of Will County.

"(22) The violation of the constitutional rights of plaintiffs and plaintiff class as aforesaid constitutes *an intentional deprivation of the civil rights* of plaintiff and plaintiff class by defendants under color of the laws of the State of Illinois and the authority of the Board of Review of Will County, in violation of the Civil Rights Act of 1871, 42 U.S.C. §1983.

"(23) The conspiracy of the defendant members of the Board of Review, *wilfully* acting in concert, to arbitrarily and discriminatorily increase the 1978 assessments of plaintiffs and the plaintiff class as heretofore described is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States." (Emphasis added.)

Plaintiffs filed a class action in the United States District Court for the Northern District of Illinois, seeking damages pursuant to the Civil Rights Act (42 U.S.C. § 1983), as indicated, which authorizes a cause of action for damages for any "deprivation of rights, privileges or immunities secured by the Constitution and laws * * * ."

Section 1983 was originally adopted under the colorful designation, the Ku Klux Act of April 20, 1871, section 1, for the express purpose of enforcing the provisions of the Fourteenth Amendment, and the congressional debates made clear that the lawless activities of the Ku Klux Klan in the South at that time were intended to be subject to federal remedy. In discussing the history of section 1983, Justice Douglas in *Monroe v. Pape* (1961), 365 U.S. 167, 171-2, 81 S. Ct. 473, 476, said:

"There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-7, 25 L. Ed. 676, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it, * * *. The question with which we now deal is the narrower one of whether Congress, in enacting § 1979 [now 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. * * *. We conclude that it did so intend."

Accordingly, section 1983 provides a remedy where public officials fail to execute the provisions of state law, thereby denying citizens the guarantees of the Fourteenth Amendment otherwise afforded to them.

While this suit was pending in federal court, the United States Supreme Court ruled that actions brought under section 1983 alleging unconstitutional administration of state tax systems must be initially brought in a state court. (*Fair Assessment in Real Estate Assoc. v. McNary* (1981), ... U.S. ....., 102 S. Ct. 177.) As a consequence of that decision, the parties to this action agreed to transfer this cause to the circuit court of Will County. It is not disputed that Illinois courts have concurrent jurisdiction with Federal courts to hear claims founded upon alleged violations of section 1983. (*Bohacs v. Reid* (2nd Dist. 1978), 63 Ill. App. 3d 477, 379 N.E.2d 1372; *Alberty v. Daniel* (3d Dist. 1974), 25 Ill. App. 3d 291, 323 N.E.2d 110.) After the transfer, defendants filed a motion for judgment on the pleadings which was granted by the trial court, as aforesaid.

Plaintiffs first argue that the trial court erred in basing its ruling on the doctrine that plaintiffs were required to exhaust their administrative remedies before bringing suit under the federal statute. Defendants agree that the exhaustion doctrine is not applicable to actions under section 1983 of the Civil Rights Act and assert further that

they do not rely upon that doctrine. (See *Patsy v. Board of Regents of the State of Florida* (1982), ... U.S. ....., ... S. Ct. ....., 73 L. Ed. 2d 172.) We think that a careful reading of the trial court's memorandum opinion indicates that the trial court did not apply the exhaustion doctrine but rather considered several exhaustion cases in determining whether Illinois law afforded plaintiffs due process. Accordingly, we will not belabor the doctrine of exhaustion of administrative remedies by further consideration.

Plaintiffs also assert that the trial court erred when it failed to find that defendants denied plaintiffs their federal constitutional right to due process. This issue is quite simply presented to us. Section 108 of the Revenue Act (Ill. Rev. Stat. 1979, ch. 120, par. 589(5)) provides that the assessment of any class of property shall not be increased until the Board of Review has given the owners of the property affected an opportunity to be heard within 20 days following publication of notice of the proposed increase. Defendants admit that they did not comply with the requirements of the statute, but they argue that every violation of a state statute does not automatically rise to the level of deprivation of a constitutional right.

The statutory basis for plaintiffs' claim is Section 1983 (42 U.S.C.S. § 1983) which provides in part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The constitutional right asserted by plaintiffs is found in the Fourteenth Amendment of the Constitution of the United States which provides that no State shall "deprive any person of life, liberty, or property, without due

process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiffs contend that the defendants acting as members of the Will County Board of Review, and thus under color of the statutes of the State of Illinois, deprived them of their property by causing additional taxes to be levied without giving them an opportunity to be heard. Defendants do not dispute that they acted under color of state statutes and, that plaintiffs have been deprived of property by taxation, but defendants insist there had been no denial of plaintiffs' constitutional right to due process.

Illinois statutes provide several remedies for property owners who seek redress for excessive taxes. When a taxpayer is dissatisfied with a decision by the Board of Review, he is entitled to appeal the Board's decision to the Property Tax Appeal Board, and to seek judicial review of the decision of the Property Tax Appeal Board pursuant to the Administrative Review Act. (Ill. Rev. Stat. 1981, ch. 120, pars. 592.1, 592.4.) Also, as an alternative remedy, any taxpayer not satisfied with the decision of the board of review may file objections in the circuit court (after paying the tax under protest) to obtain a tax refund. (See Ill. Rev. Stat. 1981, ch. 120, pars. 675, 676, 716.) According to the record on appeal, plaintiffs, or at least some of them, did seek relief from the Property Tax Appeal Board, but upon denial of their claim by the Appeal Board, judicial review was not pursued.

We also note that in *Parratt v. Taylor* (1981), 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420, the Supreme Court considered a complaint by a prisoner seeking to recover damages for personal property lost by prison officials and held that remedies provided by the State were sufficient to satisfy the due process clause even though they were available only after the deprivation of property had occurred. The Court stated:

> "Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fun-

damental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' * * * we have rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property." 451 U.S. at 40, 101 S. Ct. at ....., 68 L. Ed. 2d at 432.

Plaintiffs also argue that the remedies available to it are not adequate to provide due process because they require payment of the tax under protest and because interest, costs and fees cannot be recovered. The response of *Parratt v. Taylor*, 451 U.S. at 544, 101 S. Ct. at ....., 68 L. Ed. 2d at 434, is:

> "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Cf., Rosewell v. LaSalle Nat. Bank* (1981), 450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464.

As the trial court noted, our courts have held that a party cannot complain that he has been deprived of procedural due process when he has declined to pursue the remedies which the state provides. (*E.g., Marlowe v. Village of Wauconda* (2nd Dist. 1981), 91 Ill. App. 3d 874, 415 N.E.2d 660; *Rawlings v. Illinois Department of Law Enforcement* (3d Dist. 1979), 73 Ill. App. 3d 267, 391 N.E.2d 758.) In *Dusanek v. Hannon* (7th Cir. 1982), 677 F.2d 538, the court cited *Marlowe*, *Rawlings*, and other cases, and then observed:

> "These decisions do not amount to a requirement of exhaustion of administrative remedies as a predicate to a section 1983 claim. Rather, they express the logical proposition that a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff simply refused to avail himself of them." 677 F. 2d at 543.

The point of these cases as applied to the case at bar is that plaintiffs were not denied due process by the failure of the Board of Review to make available the statutorily required hearing before the taxes were due because plaintiffs had post-deprivation opportunities to present the merits of their claim before they were finally deprived of their property. (See *Logan v. Zimmerman Brush Co.* (1982), ... U.S. ....., 102 S. Ct. 1148, ... L. Ed. 2d ..... .) We conclude, therefore, that the action of the Board of Review, though illegal under the law of Illinois, did not deprive plaintiffs of their property without due process of law because Illinois law provides additional remedies to protect taxpayers from just the sort of arbitrary action by taxing officials as had been alleged here.

Plaintiffs further contend that defendants' arbitrary and discriminatory conduct towards plaintiffs' property was a violation of their right to equal protection of the laws. This argument is predicated upon the Illinois constitutional provision that requires all property to be taxed uniformly as provided by the General Assembly (Ill. Const. 1970, art. IX, § 4(a)). The Illinois legislature implemented the constitution with section 20a of the Revenue Act (Ill. Rev. Stat. 1979, ch. 120, 501a) which provides that any classification of real property must be established by ordinance of the County Board or it is void. Since the Will County Board has not enacted an ordinance creating classes, real property used for industrial and commercial purposes in Will County is legally entitled to the same level of assessment as residential, agricultural, and all other classes of property. In addition, and in fact, these plaintiffs accuse the Board of Review of the sort of intentional and discriminatory action by public officials against classes of person or property which has traditionally run afoul of the equal protection clause.

When state officers engage in unlawful administration of a state statute fair on its face, causing unequal application to those who are entitled to be treated alike, a denial of equal protection exists if the discrimination was intentional or purposeful. (*Snowden v. Hughes* (1943), 321 U.S.

1, 64 S. Ct. 397, 88 L. Ed. 497; *International Society for Krishna Consciousness Inc. v. City of Evanston* (1st Dist. 1980), 89 Ill. App. 3d 701, 411 N.E.2d 1030.) In order to establish a discriminatory purpose, those aggrieved must show that "the decisionmaker singled out a particular group for disparate treatement and selected his course of action at least in part for the purpose of causing its adverse effects on an identifiable group." (*Shango v. Jurich* (7th Cir. 1982), 681 F. 2d 1091, 1104.) Thus more is required than misinterpretation of law or even arbitrary application of statutes and rules.

In *Snowden v. Hughes* the court used as a "familiar example" of the denial of equal protection "the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws." The court noted that one illustration of purposeful discrimination would be "a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute." (321 U.S. at 9, 64 S. Ct. at ....., 88 L. Ed. at 503.) Although *Snowden* involved the right of a candidate to be certified as a nominee for political office and the court ultimately held that the departure from state law in that case did not amount to a violation of a federal right, the principles laid down for defining equal protection violations have withstood the test of time and are, we believe, applicable to the case before us.

The allegations in the complaint here are much the same as the factual situation in the "familiar example" discussed in *Snowden*. Plaintiffs charge defendants with *purposefully* and *intentionally* discriminating against the classes of property owned by plaintiffs in that defendants unlawfully placed an increased financial burden on commercial and industrial property and not on other classes of property. According to the complaint, defendants have systematically over-valued two classes of property and have systematically under-valued other classes. Under the test of

Snowden, plaintiffs have a cause of action against defendants. Similarly, in *Weissinger v. Boswell* (M.D. Ala. 1971), 330 F. Supp. 615, it was held that property owners were denied their Fourteenth Amendment right to equal protection where state officials intentionally and systematically refused to perform their duties in accordance with state law and, as a result, certain classes of property were assessed at a substantially higher percentage than others.

Defendants argue that the classification of real property by its industrial and commercial purposes has been recognized as having a rational basis and thus does not violate the constitution. Federal courts have said that while a state can classify property according to its use, the relevant question in an equal protection claim is whether the state has in fact done so. In other words, the Fourteenth Amendment commands equality of treatment unless the state has in fact established different and reasonable classes of property. (*Louisville v. Nashville RR. v. Public Service Comm'n of Tennessee* (M.D. Tenn. 1966), 249 F. Supp. 849, 899.) But here it is not the classification itself that plaintiffs assert to be unconstitutional; it is the intentional, unlawful, purposefully discriminatory treatment of those classes that is alleged to impinge upon plaintiffs rights.

We therefore conclude that, on the basis of the facts alleged in the complaint and admitted by the motion for judgment on the pleadings, plaintiffs have a cause of action under section 1983 of the Civil Rights Act for denial of their right to equal protection of the laws. Those portions of the complaint which we have quoted above assert a purposeful, intentional discrimination against two classes of property owners which is actionable conduct under Illinois and Federal law. We hold that the trial court erred in dismissing the complaint.

The judgment of the circuit court of Will County is reversed, and this cause is remanded for further proceedings.

Reversed and remanded.

ALLOY and SCOTT, JJ., concur.

STATE OF ILLINOIS,
APPELLATE COURT,
THIRD DISTRICT,—ss.

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of August in the year of our Lord one thousand nine hundred and eighty three.

/s/ Joseph Formesley
Clerk of the Appellate Court

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

December 6, 1983

Mr. William V. Kurnik
Kurnik and Cipolla
120 W. Eastman St.
Arlington Heights, IL 60004

No. 59108 - Beverly Bank, Trustee under Trust No. 8-3130; et al., etc., et al., respondents, vs. Board of Review of Will County; et al., etc., et al., petitioners. Leave to appeal, Appellate Court, Third District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

The Mandate in this cause will be issued to the appropriate Appellate Court on December 28, 1983.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

Filed May 3, 1982

IN THE CIRCUIT COURT
FOR THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

BEVERLY BANK, et al.,

Plaintiffs,

NO. 82 L 20 vs.

BOARD OF REVIEW OF WILL COUNTY, et al.,

Defendants.

ORDER

This matter comes on for decision as to the Motion of the Defendants for Judgment on the Pleadings. The Cause has been argued orally before this Court, Briefs have been submitted, and this Court has considered the Briefs and has considered all cases therein cited.

The Third Amended Complaint of Plaintiffs is a Class Action, brought by Plaintiffs for themselves and for other members of the Class under 28 U. S. C. Section 1983 et seq. Plaintiffs are owners of realty situated in Will County, Illinois. Defendants are either members of the Board of Review, or County Officials of Will County, Illinois, or the County of Will. The Third Amended Complaint sets forth, in brief, that, in the tax year 1978, the County of Will had certified the assessments for that year, and that the Department of Local Government Affairs had determined that the assessments as submitted were some $205,000,000.00 below the amount required to equalize Will County properties with other counties of the State of Illinois, and that an equalizer of 1.13 should be imposed. The

Third Amended Complaint further sets forth that in August or September 1979 the Board of Review, to avoid the imposition of the equalizer of 1.13, increased the 1978 assessments of selected parcels of commercial and industrial real estate, and also of personal property, by 10%, thus to raise the level of assessments so that the equalizer would not be imposed. It is charged that this action by the Board of Review was illegal under Illinois law, and violated the constitutional rights of Plaintiffs under the Fourteenth Amendment of the Constitution of the United States of America, and that the same was in violation of the Federal Civil Rights Act, 28 U. S. C., Sec. 1391 and other pertinent sections. It is further charged in the Third Amended Complaint that tax bills were sent out to taxpayers, including Plaintiffs and the members of the Class, in accord with such illegally increased assessment. The Third Amended Complaint also charges that it was the duty of the Board of Review, before making upward adjustment of assessments, to give notice to the owner of the realty concerned and to afford a hearing by said taxpayer relative to such proposed increase of assessment, and that in making the increase abovementioned, the Board of Review failed to notify the interested taxpayers of such increase or to afford any hearing relative thereto. It is charged, in the Third Amended Complaint, that the actions of the Board of Review were illegal and arbitrary, in effect creating an illegal classification of taxpayers, with no Ordinance to allow such classification, and that the actions of the Board of Review, and thus of the County of Will, violated the rights of the Plaintiffs and other members of the Class as to due process and equal protection under the Constitution of the United States of America, and in violation of the Federal Civil Rights Act, 28 U. S. C. Section 1983 and other sections of the Act. The Third Amended Complaint prays that this Court declare the actions of the Board of Review unconstitutional and void, that damages be awarded in an amount equal to the illegal increase of taxation, and that Plaintiffs recover costs and attorneys fees, plus interest.

It is noted that this action was originally brought in the United States District Court for the Northern Dis-

trict of Illinois, Eastern Division, and that, after pending for some time in that Court, it was transferred to this Court, in accord with previous rulings of the Supreme Court of the United States.

The Motion of Defendants for Judgment on the Pleadings, of course, admits all facts well pleaded by Plaintiffs, but, in effect, says that admitting all such facts, the Complaint must result in judgment for Defendants. The Defendants, in effect, admit that a violation of Illinois law is properly pleaded by Plaintiffs, but Defendants say that this does not constitute a valid action under the Federal Civil Rights Act.

The law relative to Motions for Judgment on the Pleadings may be summarized briefly. It is brought under ILLINOIS REVISED STATUTES, Chapter 110, Section 45, Subsection (5), which reads: "Any party may seasonably move for judgment on the pleadings." In HALL VS. HUMPHREY-LAKE CORPORATION, 29 Ill. App. 3rd 956, 331 NE 2nd 365 (1975), a First District case, the Court said: "All well pleaded facts and all fair inferences which can be drawn from the opposing litigant's pleadings are taken as admitted by a party who moves for judgment on the pleadings." In HARTFORD ACCIDENT AND INDEMNITY CO. VS. CASE FOUNDATION CO., 10 Ill. App. 3rd 115, 294 NE 2nd 7 (1973), a First District case, the Court said: "When considering a motion for judgment on the pleadings, the trial court must ascertain whether there is an issue of fact. If there is not, then the only question is which party is entitled to judgment." And in ZEINFELD VS. HAYES FREIGHT LINES, INC., 82 Ill. App. 2nd 463, 226 NE 2nd 392 (1967), a First District case: "A motion for judgment on the pleadings will be allowed when the court is able to determine from the pleadings alone the relative rights of the parties in the subject matter; in passing upon such motion the court must consider only those material facts and allegations which are well pleaded, disregarding all surplus and conclusory allegations." And in CUNNINGHAM VS. MAC NEAL MEMORIAL HOSPITAL, 47 Ill. 2nd 443, 226 NE 2nd 897 (1970): ". . . a motion for judgment on the

pleadings, as filed by defendant in the circuit court herein, tests the sufficiency of the pleadings as a matter of law (in this case the adequacy of plaintiffs' second amended complaint) and admits the truth of all facts well pleaded in the pleadings of the opposite party." And, finally, in ARLINGTON HEIGHTS NATIONAL BANK VS. VILLAGE OF ARLINGTON HEIGHTS, 33 Ill. 2nd 557, 213 NE 2nd 264 (1966): "Such a motion admits the truth of facts well pleaded, as distinguished from mere conclusions, together with all fair inferences to be drawn therefrom . . . and the moving party admits the untruth of his own controverted allegations."

This action is predicated under 42 U. S. C. Section 1983, which reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or any other person within the jurisdiction thereto to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

In BATES VS. SPONBERG, 547 F 2nd 325 (1976), CCA, 6th Cir. the Court had before it a case where a Professor at Eastern Michigan University was suspended. The Court said: "It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional process of state institutions." The Court noted that Federal Courts have upon many occasions invalidated procedures of Federal agencies, but ". . . . the basis for such reversals is not, as Bates asserts, the Due Process Clause, but rather a rule of administrative law." The Court states the issue: ". . . . whether the hearing accorded him was meaningful." The Court concluded that the hearing given Professor Bates by the University met ". . . the minimal requirements of due process." The District Court, which

had granted Summary Judgment to the Plaintiff, was reversed.

In BORMANN VS. TOMLIN, 461 F. Supp. 193 (1978), USDC, SD Ill. SD, the Court dealt with an action under the Civil Rights Act, where tax officials, to collect delinquent taxes, broke into the garage of Plaintiff, seizing certain property, the same being without any warrant issued by a Court. The Court said: "A state or county tax official will be liable for damages under Section 1983 only if he violated the plaintiff's clearly established constitutional rights intentionally or with reckless disregard of those rights. The tax official must have personally acted with an impermissible motivation or with such intentional and reckless disregard of the plaintiff's clearly established constitutional rights that his action cannot be reasonably characterized as being in good faith." The Court held unconstitutional the Illinois statute permitting such summary seizure of property without a court-issued warrant. The Court also said: "Illinois statute provides a method of review, including administrative as well as judicial to determine whether the personal property was validly subject to tax and assessed at the correct statutory rate . . . due process rights are protected." The Court held that while declaratory or injunctive relief could not be maintained, an action for damages, under the Civil Rights Act, could.

In STREET VS. SURDYKA, 492 F 2nd 368 (1974), CCA, 4th Cir. the Court said: "Section 1983 does not provide a remedy for common law torts. Instead, it creates a federal cause of action against those acting under color of state law who cause a 'deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States.' In many cases the same conduct will violate both state law and the federal constitution, but certainly not all violations of state law rise to the level of constitutional tort." Here was a warrantless arrest, but no violation of the Civil Rights Act, under the facts of the case.

In UNITED STATES LABOR PARTY VS. OREMUS, 619 F. 2nd 683 (1980), CCA, 7th Cir., the Court had

before it an attempt by a newspaper to peddle its papers by peddlers on foot, selling to motorists on streets. An Illinois Statute prohibited such attempted sales on Illinois Highways. The municipality first forbad such action, then issued a permit to permit it, then, without a hearing, revoked the permit. The Court said: "The Supreme Court, since its 1972 decision in Board of Regents vs. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2nd 548 (1972) has continually held that an individual deprived by state action of a liberty or property interest is entitled to some procedure to determine if the individual has been treated fairly. At the threshold, however, state action must impinge a liberty or property interest of an individual. . . . After the deprivation of an individual's liberty or property interest is established, the application of Mathews vs. Eldridge, 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2nd 18 (1976), balancing analysis determines the process to which the Constitution entitles the individuals" Due Process, under Mathews depends: "First, the private interest that will be affected by the official action; second, the rest of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguard; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Here the permit was issued contrary to Statute, so no hearing was necessary to revoke it. The Civil Rights action fails, thus.

In URETSKY VS. BASCHEN, 47 Ill. App. 3rd 169, 361 NE 2nd 875 (1977), a Second District case, the Court had before it an action for Declaratory Judgment Injunction and also a Count under the Federal Civil Rights Act. The Circuit Court dismissed the Complaint. The Court cited CLARENDON ASSOCIATES VS. KORZEN, 56 Ill. 2nd 101 (1976), " 'In view of the existence of our present statutory remedy, there is no apparent reason for continuing to afford equitable relief in such cases unless the remedy at law is found to be inadequate . . . the fundamental rule that equity will not assume jurisdiction unless

special grounds for equitable jurisdiction are established, and unless the plaintiff does not have an adequate remedy at law, is subject to two exceptions, namely, where a tax is unauthorized by law or is levied upon exempt property. This rule requires, other than in cases involving the two exceptions, a special ground for equitable jurisdiction, such as fraudulently excessive assessment, must exist and that an adequate remedy at law must not be available." Here the increased assessments were at issue, not one of unauthorized tax or exempt property, and the claim that the increased assessment unauthorized was rejected by the Court. The Court further said: "The legal validity or constitutionality of a property tax assessment may be treated in tax objection proceedings in the circuit court . . . as well as in proceedings in the circuit court on administrative review of the State Property Tax Appeal Board's decision. . . . It should also be observed that the question whether the assessment of real property may be changed in a quaduadrennial year may be addressed in an appeal from objection proceedings." It was also noted that payment could be made under protest. "It is apparent that the taxpayer has an adequate remedy provided in the Revenue Act of 1939." The Taxpayer may file objections with the Board of Review or with the State Property Tax Appeal Board, and thus, under Statute, the same is reviewable in the Circuit Court. The Complaint, in Count III, alleged violations of the Federal Civil Rights Act, in that the assessor withheld notice of increased assessments for such a long time that the taxpayer could not prepare his appeal; inadequate notice was also charged, that a continuance was denied, and that there was a refusal to act on his claim. The Court said: "To state a cause of action under 1983 a plaintiff must first plead facts sufficient to show that the defendant has (1) acted under color of State law and (2) infringed upon or deprived him of constitutional rights. . . . The provisions of section 1983 have been applied to an allegation of deprivation of property rights. . . . However, the plaintiff is also required to set forth specific illegal conduct and resultant harm in a way which will permit an informed ruling whether the wrong complained of abridges the Federal

rights included in section 1983." The Court then cited DIETMAN VS. HUNTER, 5 Ill. 2nd 486 (1955): " 'Due process requires that the property owner be given notice and an opportunity to be heard upon the valuation of his property at some point in the taxing process before his liability to pay the tax becomes conclusively established. . . . On the other hand, the taxpayer is not entitled to notice and an opportunity to be heard at each stage, or at any particular state, of the assessment procedure. . . . The requirements of due process are satisfied by a law which affords an opportunity to be heard with respect to assessments before the board of review. 'But a law prescribing a time when complaints will be heard before the board of review is all the notice that is required. . . . If the law secured to the defendant a hearing after the assessment was in fact made, of which he had notice by the statute, that would be sufficient.' . . . An assessor's failure to grant any hearing of his increase of an assessment without notice and an opportunity to be heard may, however, amount to a denial of a party's constitutional right to due process." Here the taxpayer had notice and did, in fact, have a hearing before the board of review. The taxpayer had 18 days' notice, and this was held sufficient. The Court held that 10 days' notice would be sufficient to satisfy due process. The Dismissal order was affirmed.

In DIETMAN VS. HUNTER, 5 Ill. 2nd 486, 126 NE 2nd 22 (1955), the Illinois Supreme Court had before it a case where the Supervisor of Assessments had increased assessments of one township without giving notice and without the opportunity to be heard. The Court said: "Due process requires that the property owner be given notice and an opportunity to be heard upon the valuation of his property at some point in the taxing process before his liability to pay the tax becomes conclusively established. A failure in this regard renders the tax void and uncollectible . . . On the other hand, the taxpayer is not entitled to notice and an opportunity to be heard at each stage, or at any particular stage of the assessment procedure. So it has been held that if the taxpayer

may be heard upon the question of valuation in an action brought to collect the tax . . . or in an action to restrain collection of the tax . . . due process requirements have been satisfied." "The requirements of due process are satisfied by a law which affords an opportunity to be heard with respect to assessments before the board of review." It was, thus, held sufficient to satisfy due process if an opportunity for hearing was afforded before the final duty to pay the tax. The Court expressly overruled PEOPLE EX REL. EISELE VS. ST. LOUIS MERCHANTS' BRIDGE COMPANY, 268 Ill. 477 and 263 Ill. 50. Thus the tax was held valid.

In LITTLE SISTER COAL CORPORATION VS. DAWSON, 45 Ill. 2nd 342, 259 NE 2nd 35 (1970), concerning payment of personal property taxes under protest, the Court said: "As has been stated, due process requires only that the property owner be given notice and an opportunity to be heard upon the valuation of his property at some point in the taxing process before his liability to pay the tax becomes finally established." The Court also said: "With notice through the required publication of all assessments . . . and the opportunity to be heard before the board of review, the requisites for due process are satisfied." The case of CLEGHORN VS. POSTLEWAITE, 43 Ill. 428 (1897) was overruled. As to the assessments being changed before the opportunity to be heard, the Court said: "There is no requirement in the statute that notice and an opportunity for hearing precede those alterations." The Judgment for Defendant was affirmed.

In MARLOWE VS. VILLAGE OF WAUCONDA, 91 Ill. App. 3rd 874, 415 NE 2nd 630 (1981), a Second District case, the Court said: "Plaintiffs have also contended they were denied procedural due process in that they had a protected interest in the building permit with which defendants could not interfere absent prior notice and hearing . . . It is well established that a post deprivation hearing can satisfy due process requirements . . . and equally well established that one cannot complain of an alleged procedural due process violation where he declines to pursue the administrative remedy which is provided."

While not dealing expressly with the due process issue, the case of ILLINOIS BELL TELEPHONE COMPANY VS. ALLPHIN, 60 Ill. 2nd 350, 326 NE 2nd 737 (1975) is of interest. Here a claim of exemption from taxation as to transmittal of messages was involved, with Injunctive relief sought in the Complaint. The Court said: ". . . the doctrine of exhaustion has long been a basic principle of administrative law—a party aggrieved by administrative action ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to him . . . This rule is the counterpart of the procedural rule which, with certain exceptions, precludes appellate review prior to a final judgment in the trial court, and the reasons for its existence are numerous: (1) it allows full development of the facts before the agency; (2) it allows the agency an opportunity to utilize its expertise; and (3) the aggrieved party may succeed before the agency, rendering judicial review unnecessary . . . All jurisdictions have recognized that the exhaustion doctrine, if strictly applied, could sometimes produce very harsh and inequitable results. While our courts have required comparatively strict compliance with the exhaustion rule, exceptions have been recognized where an ordinance or statute is attacked as unconstitutional in its entirety . . . or where multiple remedies exist before the same zoning board and at least one has been exhausted . . . or where irreparable harm will result from further pursuit of administrative remedies . . . It is not our intention by this opinion to affect these existing exceptions." The Court cited OWENS-ILLINOIS GLASS CO. VS. MC KIBBIN, 385 Ill. 245 (1943), where it was held that collection of an illegal tax can be enjoined without first exhausting administrative review, and the Court said ". . . we hold that as to those situations covered by the Administrative Review Act, the Owens exceptions are no longer applicable. We believe this ruling to be a logical extension of the exhaustion doctrine in furtherance of the legislative goals evidence by the adoption of the Administrative Review Act."

In PEOPLE EX REL KORZEN VS. FULTON MARKET COLD STORAGE COMPANY, 62 Ill. 2nd 443,

343 NE 2nd 450 (1976), the Court said: "If it were shown that there was no means by which the reduction in the assessed valuation of objector's property could be effected under the statutory administrative procedure, it could perhaps be argued that the filing of the complaint was not required." But here the failure to pursue the administrative remedies was held to bar the action.

In APPLICATION OF THE COUNTY TREASURER VS. WILLS, 53 Ill. App. 3rd 760, 11 Ill. Dec. 519, 368 NE 2nd 1127 (1977), a Fourth District case, general taxes had been paid under protest and then objections were filed in the Circuit Court. The Motion to Dismiss was granted, on the ground that the taxpayer had not pursued his administrative remedies. The notice had been published in a local newspaper, and notice had been mailed to the taxpayer. The Court held that there was no right, here, to judicial review, ". . . even fraudulent assessments, until the administrative remedy has been exhausted. One exception to this doctrine has been recognized: a judicial review is permitted where the taxpayer has been deprived of his administrative remedy through fraud on the part of administrative officials." The Court noted the special exception in HOYNE SAVINGS AND LOAN ASSOCIATION VS. HARE, 60 Ill. 2nd 84, 322 NE 2nd 833 (1974).

In HOYNE SAVINGS AND LOAN ASSOCIATION VS. HARE, 60 Ill. 2nd 84, 322 NE 2nd 833 (1974). There the tax authorities admitted that the 1971 assessment of plaintiff's property was grossly excessive. No notices had been mailed to Plaintiff, although there had been publication in a local newspaper. The increase in assessment from the prior year was "significant though not necessarily by itself controlling". It was also shown that the assessment was factually in error. And the assessor completed his work at an "extremely late date", and the publication was several months late. But in 1973 the assessment was substantially reduced. The tax authorities admitted that the 1971 assessment was grossly excessive. The Supreme Court held that: "Under these circumstances it would be extremely unfair and unjust for this

court to adhere to a rigid formula which would require that all relief from fraudulently excessive assessments be sought through the legal remedy provided by statute. This is a proceeding in equity and a court of equity is not bound by strict formulas . . . but may shape its remedy to meet the demands of justice in every case, however peculiar." But it was held that this ruling applied only to the 1971 tax, and not to the 1972 tax, where Plaintiff elected not to use statutory procedures, and thus the assessment, probably excessive also, was affirmed for the 1972 tax.

In CLARENDON ASSOCIATES VS. KORZEN, 56 Ill. 2nd 101, 306 NE 2nd 299 (1974), it was noted that in tax matters Equity will not grant relief where there is an adequate remedy at law, with exceptions of an unauthorized tax and where levied on exempt property. The Court noted that, in light of the Act of 1933, giving the right to pay under protest and then request hearing, the cases of fraudulently excessive assessments can no longer have direct equity action in over-valuation cases, but the Court noted: "There will be cases of fraudulently excessive assessments where the remedy at law will not be adequate and injunctive relief should then be available." But no such equitable relief was held available in this case.

In KORZEN VS. COMMERCIAL STAMPING AND FORGING, INC., 42 Ill. App. 3rd 895, 1 Ill. Dec. 562, 356 NE 2nd 844 (1976), a First District case, the Court held that the pre-payment requirement was constitutional, under the Illinois Constitution of 1970.

In CHICAGO SHERATON CORPORATION VS. ZABAN, 71 Ill. 2nd 85, 15 Ill. Dec. 634, 373 NE 2nd 1318 (1978), the Plaintiff had filed for Injunction and other relief, alleging excessive assessments. Errors in the assessment were admitted. The Court cited CLARENDON ASSOCIATES VS. KORZEN, 56 Ill. 2nd 101, where ". . . the court held that equity will not enjoin the collection of taxes based on a constructively fraudulent assessment unless the assessment is so fraudulently excessive as to render the remedy at law unavailable to the

plaintiff." But such a situation was not present in this case. The Court held that the Plaintiff had the right, under the law, to file objections and pay under protest, and that the failure to do so bars the claim. The Dismissal Order of the Circuit Court was affirmed.

In IN RE APPLICATION OF COUNTY TREASURER VS. PIPER'S ALLEY CORPORATION, 35 Ill. App. 3rd 449, 342 NE 2nd 249 (1976), a First District case, the Court said: ". . . and in LaSalle National Bank vs. County of Cook (1974), 57 Ill. 2nd 318, 312 NE 2nd 252, the court stated that an excessively high assessment does not come with the 'ambit' of a tax unauthorized by law." The Court then held that the failure to pursue administrative remedies defeated the action here.

In DOCKSIDE DEVELOPMENT CORPORATION VS. TULLY, 78 Ill. App. 3rd 482, 33 Ill. Dec. 431, 396 NE 2nd 1155 (1979), a First District case, the Court said: "The general rule that applies in the field of taxation is that where a taxpayer has an adequate remedy at law equity will not assume jurisdiction unless the tax is unauthorized by law or is levied upon exempt property . . . The remedy provided by law for the recovery of illegal taxes paid on real estate is the statutory remedy of paying the tax under protest and filing an objection to the application for judgment." The Circuit Court, here, had issued an injunction, and was reversed.

The essential inquiry then is, did the Plaintiffs have an adequate procedure that it was necessary to follow in the administrative process as set forth by the statutory structure of tax law, before any application of due process or equal protection under the United States Constitution and under the Federal Civil Rights Act, and, in considering the adequacy of such laws, did the law provide notice and an opportunity to be heard, coupled with the right to take the matter to the courts, if the administrative bodies of the State of Illinois did not give proper redress?

It is clear that no remedy was afforded by the Board of Review of Will County. The Complaint charges, and it is factually admitted, that the Board of Review raised

the assessments in question by 10% without either notice or an opportunity to be heard. But the Board of Review, in accord with statute, caused the revised assessments to be delivered to the Property Tax Appeal Board, and publication was made before this. The Plaintiffs admittedly had proper notice of this. ILLINOIS REVISED STATUTES, Chapter 120, Sections 590.1, 592.1, 592.2, 592.2a, 592.3, 592.4 and 592.5 deal with the duties and activities of the Property Tax Appeal Board. Section 592.1, provides, in part: ". . . any taxpayer dissatisfied with the decision of a board of review as such decision pertains to the assessment of his property for taxation purposes . . . may, within 30 days after the date of written notice of the decision of the board of review, appeal such decision to the Property Tax Appeal Board for review." Section 592.3 provides for the conducting of hearings. Section 592.4 provides, among other things, for Administrative Review under the Administrative Review Act. The Plaintiffs, in the case at bar, chose not to afford themselves of this procedure, but filed their action under the Federal Civil Rights Act.

This Court must now determine whether the structure of Illinois Tax law affords due process and equal protection of the laws, so that relief could have been afforded Plaintiffs under state law, had they chosen to use such laws. Under the case law, both Federal and State, there is no question in the mind of this Court that the answer is in the affirmative. Granted, the action of the Board of Review was illegal, and granted that the result was wrongful, and, if no means were afforded for correction under State law, the same would certainly subject the Defendants, at least the then members of the Board of Review, to an attack of violation of the Constitution of the United States of America. But the State of Illinois did afford relief from the illegal acts of the Board of Review. And the Plaintiffs chose to ignore such means afforded them to seek redress.

It is true that the cases cited in this Order do not, in toto, deal with cases under the Federal Civil Rights Act. And not all of the cases cited deal expressly with consti-

tutional issues. But the issue of Exhaustion of Remedies is closely related, although certainly not the same, as the constitutional issues, and is, in the opinion of this Court, relevant.

Also, it is true that other than cases of the United States Supreme Court, Federal cases are not binding law upon this Court, but only advisory. But in dealing with the proper interpretation of a Federal statute, certainly, even if only advisory, such cases must be closely considered by this Court.

This cause was argued, as to the Motion for Judgment on the Pleadings, on March 17, 1982, and then taken under advisement. The Docket Sheet indicates that the Brief of Defendants had already been filed with the Court, and that Plaintiffs were given 10 days from March 17, 1982 to file Plaintiffs' Brief, the same being filed March 31, 1982. No further Briefs were designated by the Docket Sheet, but the notes of this Court indicate that after the filing of Plaintiff's Brief, Defendant was to have an additional 14 days to file Reply Brief. It is noted that Plaintiff's Brief was, in fact, filed 4 days late. Defendant did not file any Reply Brief within the designated 14 days, which, including late filing by Plaintiff, would have expired on April 14, 1982. This Court uses a loose-leaf "Advisement Calendar" and designated this case as out of advisement on April 13, 1982, and, with late filing, this should have been April 15, 1982. Due to trials and other cases under advisement, this Court did not commence work on this case until April 19, 1982, but has worked at times available, since then. Now, on April 28, 1982, a Motion was presented by Defendants, asking leave to file a Reply Brief. While there was no Reporter present, the record may reflect here that this Court strongly indicated to Counsel for Defendants that the presentation of this Motion, when the Court had drafted, for typing, its Order, did not meet with the approval of the Court, and that, at the least, if not under the terms of the Civil Practice Act and Supreme Court Rules, at least in the proper fairness to the Court, a letter or phone call to this Court, seeking additional time in which to file Reply Brief,

could have been made, and it would have, if within reason, been granted. The time of Courts, in the opinion of Counsel for Defendants, may or may not be of any value, but the administration of justice calls for, to the best of one's ability, an adherence to schedules, including that of Briefing. It was within the discretion of this Court to deny the right to file the late Brief, but this Court seeks in all matters to be fully advised so that the decisions of this Court, whenever possible, will be in conformance with the law. Thus this Court did allow the filing of the Reply Brief, and has considered the same. If it is noted that several of the cases cited in this Order are ones not cited in the original Briefs, but are cited in the Reply Brief, this Court will explain that this Court maintains a loose leaf system of case law, and often, in making decisions, goes beyond cases cited in the Briefs. The maintenance of case law under Taxation, Constitutional Law, and Civil Rights, have been utilized by this Court. The Order was 9/10 completed before this Court read the Reply Brief. After reading the same, this Court sees no occasion to change the Order.

The Motion for Judgment on the Pleadings is allowed, and this Court finds the issues of this case against Plaintiffs and in favor of Defendants, and the cause of action is dismissed, as a final order of dismissal, with costs taxed to Plaintiffs.

The Clerk is ordered to send copy of this Order to all counsel of record.

May 3, 1982
Date

/s/ Thomas W. Vinson
Judge

Ill. Rev. Stat. ch. 120, § 501(a) (1979)

Where real property is classified for purposes of taxation in accordance with Section 4 of Article IX of the Constitution and with such other limitations as may be prescribed by law, such classification must be established by ordinance of the county board. If not so established, the classification is void.

No. 83-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF REVIEW OF WILL COUNTY; and **LYMAN C. TIEMAN, TED GRABAVOY**, and **HERMAN L. OLIVO**, individually and as members of the Board of Review of Will County; and **WILL COUNTY, ILLINOIS**,

Petitioners,

v.

BEVERLY BANK, Trustee under Trust No. 8-3130; and **DEMETRIOS DELLAPORTAS, PAUL COMET** and **MICHAEL HALIKIAS**, Beneficiaries, and **ALL MOTOR PARTS, INC.**, a corporation, on their own behalf and on behalf of all individuals similarly situated,

Respondents.

On Petiton For A Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether county officials who intentionally engage in the unlawful administration of a state statute fair on its face, causing unequal application to those who are entitled to be treated alike, violate the equal protection clause of the Fourteenth Amendment if the discrimination is intentional or purposeful.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

In The

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BOARD OF REVIEW OF WILL COUNTY; and LYMAN C. TIEMAN, TED GRABAVOY, and HERMAN L. OLIVO, individually and as members of the Board of Review of Will County; and WILL COUNTY, ILLINOIS,

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On Petiton For A Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Beverly Bank, Trustee under Trust No. 8-3130, Demetrios Dellaportas, Paul Comet, Michael Halikias and All Motor Parts, Inc.* respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Appellate Court of the State of Illinois, Third Judicial District, in this case.

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* Pursuant to Supreme Court Rule 28.1, neither respondents Beverly Bank nor All Motor Parts, Inc. have any parent, subsidiary or affiliated companies.

COUNTERSTATEMENT OF FACTS

Respondents submit that petitioners' statement of facts is incomplete. Respondents adopt for their statement of facts, the facts as set forth in the opinion of the court below.[1]

REASONS WHY THE WRIT SHOULD BE DENIED

THE ILLINOIS APPELLATE COURT'S HOLDING THAT LOCAL TAXING OFFICIALS DENIED RESPONDENTS EQUAL PROTECTION OF THE LAW BY UNLAWFULLY CREATING AND INTENTIONALLY DISCRIMINATING AGAINST CERTAIN CLASSES OF TAXPAYERS IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND EVERY OTHER COURT WHICH HAS ADDRESSED THE ISSUE.

By imposing liability on local taxing officials who systematically deprived certain classes of taxpayers of protection guaranteed them by Illinois law, the Illinois Appellate Court simply applied a principle long ago established in a series of decisions of this Court and unwaveringly followed by the lower courts. The appellate court held that county officials who intentionally engage in the "unlawful administration of a state statute fair on its face, causing unequal application to those who are entitled to be treated alike," violate the equal protection clause of the Four-

[1] The text of the opinion of the Illinois Appellate Court, Third Judicial District, is set forth in the Appendix to petitioners' Petition For A Writ Of Certiorari, Etc., and need not be reproduced here.

teenth Amendment if "the discrimination [is] intentional or purposeful." (Petition for a Writ of Certiorari, Etc. at 9a). The appellate court's ruling is well founded in the decisions of this Court.

Petitioners' primary complaint is that the appellate court erred by giving due consideration to the Court's opinion in *Snowden v. Hughes*, 321 U.S. 1, 9 (1944), in which this Court "used as a 'familiar example' of the denial of equal protection 'the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws.' " (Petition at 10a). Petitioners' suggestion that the rationale of *Snowden* is at odds with cases decided *prior* to *Snowden* is certainly no compelling reason for this Court to review a state court's decision which affects only a local controversy. Moreover, petitioners' suggestion is incorrect. *Snowden* is not inconsistent with other decisions of this Court; indeed, *Snowden* itself relies on a series of decisions which hold that systematic discrimination in taxation in violation of state law constitutes a violation of the equal protection clause. *See, e.g., Great Northern Ry. Co. v. Weeks*, 297 U.S. 135, 139 (1936); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 241 (1931); *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa.*, 284 U.S. 23, 25 (1931); *Bohler v. Callaway*, 267 U.S. 479, 489 (1925).

Nashville, Chattanooga & St.L.Ry. v. Browning, 310 U.S. 362 (1940), upon which petitioners rely (Petition at 7), is neither inconsistent with *Snowden* nor with the decision of the court below. In *Browning*, the Court found no infringement of the equal protection clause only because the discriminatory conduct had been ongoing for forty years and amounted to a *de facto* classification of property which was sanctioned by the State. In this case, petitioners have admitted that they intentionally discrimi-

nated against certain property owners despite the prohibition of Illinois law.[2] Ill.Rev.Stat. (1979), ch. 120, ¶501a.

Not only is *Snowden* consistent with its predecessors but, as the appellate court noted, "the principles laid down [in that case] for defining equal protection violations have withstood the test of time . . ." (Petition at 10a). Lower federal courts and state courts have uniformly applied the principles set forth in *Snowden* to cases with facts virtually identical to the instant case and have arrived at the same conclusion as the court below. *See, Louisville & Nashville R. Co. v. Public Service Commission*, 631 F.2d 426 (6th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Weissinger v. Boswell*, 330 F.Supp. 615 (M.D. Ala. 1971); *Louisville & Nashville R. Co. v. Public Service Commission*, 249 F.Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968); *Bussie v. Long*, 286 So.2d 689 (La. App. 1973); *Baldwin Construction Co. v. Essex County Board of Taxation*, 16 N.J. 329, 108 A.2d 598 (1954). There is no difference of opinion among the courts as to the issues raised in the instant petition, and certainly no need for a definitive pronouncement by this Court on a principle that has been established for over forty years.

Part II of the Petition displays a truly extraordinary analysis of the Fourteenth Amendment, but offers no

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[2] Significantly, petitioners concede that "[a]pplying different rates of taxation to property *within the same class*, violates the federal Constitution" (Petition at 6, emphasis in original), overlooking the fact that that is precisely what happened in the instant case. Under Illinois law, classes of property can be established only by enactment of an appropriate ordinance by a county board of commissioners. The Will County Board did not enact such an ordinance. Therefore, industrial real property, commercial real property, and personal property, which were the targets of petitioners' discriminatory conduct, are in the same class as residential, agricultural, and all other types of property.

ground whatsoever for review by this Court of the lower court's ruling. Petitioners seem to contend that whenever a party claims that it was denied equal protection of the law with regard to an interest in property, the party is actually invoking something petitioners call the "substantive aspect of the due process clause." (Petition at 9). Petitioners suggest that there is "some overlap" in the concepts of equal protection and due process because, in instances where there is purposeful discrimination in violation of the equal protection clause, the " 'discrimination may be so unjustifiable as to be violative of due process' " as well. (Petition at 10, quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). According to petitioners, equal protection and due process violations are essentially the same, and thus an injured party is barred from raising a claim under the equal protection clause whenever there exists an alternative forum for a hearing.

Not surprisingly, petitioners offer no support for their confused depiction of the Fourteenth Amendment. Further, petitioners' attempt to meld the equal protection clause into the due process clause, even if doctrinally valid, does not work under the facts of this case. In proving their equal protection claim, respondents will not, as petitioners contend, "be focusing on the irrationality of the [petitioners'] action." (Petition at 10). Respondents are going to prove that petitioners intentionally discriminated against them and others similarly situated in the administration of a state statute. It will be petitioners who will somehow try to demonstrate the rationality of their unlawful creation of and purposeful discrimination against classes of taxpayers in Will County, Illinois—conduct which has already been condemned by the Illinois courts and legislature.

Petitioners' denials notwithstanding (Petition at 11), all that petitioners are arguing in Part II is that respondents

must exhaust state administrative remedies prior to pursuing a claim under the equal protection clause in state court. The Illinois courts have rejected petitioners' argument, finding that judicial relief from unconstitutional conduct is entirely compatible with the Illinois administrative process.

Finally, petitioners' suggestion that this case presents issues that "extend far beyond" a state court dispute between Will County tax officials and a plaintiff class of injured taxpayers is exaggeration at best. (Petition at 11). Indeed, the Illinois Supreme Court denied petitioners' Petition for Leave to Appeal from the lower court's ruling, implying that that court did not perceive the issues in this case to extend even beyond the borders of Will County, Illinois.

CONCLUSION

For all the foregoing reasons, respondents pray that the writ of certiorari be denied.

Respectfully submitted,

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Dated: April 3, 1984

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